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IN THE
COURT OF APPEALS OF INDIANA

IN THE MATTER OF C.M.,	)	
A Child Alleged to be Delinquent,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 20A03-0703-JV-94
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE ELKHART CIRCUIT COURT
The Honorable Deborah A. Domine, Magistrate
The Honorable Terry C. Shewmaker, Judge
Cause No. 20C01-0610-JD-972

February 6, 2008

MEMORANDUM DECISION – NOT FOR PUBLICATION

RILEY, Judge

STATEMENT OF THE CASE

Defendant-Appellant, C.M., appeals the juvenile court's adjudication of juvenile delinquency based on battery, Ind. Code § 35-42-2-1, an act which would be a Class A misdemeanor if committed by an adult.

We affirm.

ISSUES

C.M. raises three issues for our review, which we restate as:

(1) Whether the State presented sufficient evidence to prove beyond a reasonable doubt that C.M. committed what would be battery, as a Class A misdemeanor, if she were an adult;

(2) Whether the juvenile court abused its discretion when it denied C.M.'s Motion for Relief from Judgment pursuant to Ind. Trial Rule 60(B); and

(3) Whether C.M.'s trial counsel provided effective assistance of counsel.

FACTS AND PROCEDURAL HISTORY

On the evening of June 22, 2006, in Elkhart, Indiana, J.B. was parked in his truck with Ch.M., a girl he was dating. At that time, J.B. was also dating C.M. C.M. learned where J.B. was, whom he was with, and decided to pay a visit with about six of her friends. The girls drove to the scene together in a van. C.M. approached the driver's side window of the truck and began yelling at J.B. J.B. turned away thinking C.M. was going to strike him, and then turned back to the window, but C.M. was not there. Quickly thereafter, Ch.M. was grabbed by her ponytail, dragged out of the truck, and thrown on the ground. Ch.M. suffered scrapes

on her knees and hands, and bleeding from the mouth. All of the girls then fled back to the van and left. Later that evening, Ch.M. and her mother contacted the police, and Ch.M. explained what had happened, identifying C.M. as her attacker.

The following day at school, C.M. and C.C., one of the girls who rode in the van with C.M., approached a teacher at their high school and told her about the incident the previous night. Both girls explained to the teacher that C.C. had pulled Ch.M. out of the truck and threw her on the ground. The principal of the high school asked the girls about the matter, and they explained to him that C.C. had attacked Ch.M.

On October 10, 2006, the State filed a Formal Delinquency Petition charging C.M. with committing an act, which if committed by an adult, would be battery, as a Class A misdemeanor, I.C. § 35-42-2-1. On January 24, 2007, the juvenile court held an evidentiary hearing. At the hearing, C.M. denied pulling Ch.M. out of the truck and testified that, although Ch.M. was one of her closest friends at the time of the incident, Ch.M. could have confused her with C.C. Ch.M. testified to the contrary that C.M. was the girl who pulled her out of the truck and threw her on the ground. Ch.M. stated that she had known both C.M. and C.C. for sometime, and she was certain that she could tell them apart, even though it was dark outside at the time of the attack. J.B. testified that he could not see the face of the person who pulled Ch.M. out of the car, but the hair and body size matched that of C.M. He also stated that he heard Ch.M. yell C.M.'s first name while the incident was happening. C.C. testified that C.M. asked her to take the blame for the battery because C.M. was

eighteen and could be charged as an adult, but C.C. was seventeen and C.M. thought that any charges would be less serious for C.C.[1]

The juvenile court entered written findings, which explained that it found Ch.M.'s testimony to be the most credible. Accordingly, the juvenile court found C.M. to be delinquent and placed her on six months good behavior, which included no contact with Ch.M.; additionally, the juvenile court ordered her to complete the GOAL program, and to pay court costs of $159.

On February 15, 2007, C.M. filed a Motion to Correct Error alleging that newly discovered evidence supported her contention of innocence. The motion explained that C.C. had stated to her guidance counselor that she was the person who pulled Ch.M. out of the truck. In addition, the motion alleged that B.H., who drove the group of girls to and from the scene of the incident, saw C.C. pull Ch.M. out of the truck, not C.M. The juvenile court found that this information was a continuation of evidence that had been presented to the juvenile court at the evidentiary hearing, and did nothing to diminish the credibility of Ch.M. Further, the juvenile court explained that the Motion to Correct Error, although based upon evidence outside the record, was not supported by affidavits as required by Trial Rule 59. Accordingly, on February 21, 2007, the juvenile court denied the Motion to Correct Error.

On March 1, 2007, C.M. filed her Notice of Appeal. But, on May 29, 2007, C.M. filed a motion to stay the appeal pending a hearing on newly discovered evidence. On June 29, 2007, we granted that motion, and on July 18, 2007, C.M. filed a Motion for Relief from

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[1] Despite this testimony, neither party raises the issue of whether C.M. was properly before the juvenile court,

Judgment with the juvenile court. The motion alleged that Detective Paul Converse (Detective Converse), of the Elkhart City Police Department, conducted a follow up investigation after C.M. had been found to be delinquent. He determined, after interviewing J.B., B.H., and three of the girls who came to the scene where Ch.M. was battered, that C.C. committed the battery, not C.M. On July 30, 2007, the juvenile court entered its Order on Motion for Relief from Judgment. It explained that although it respected the opinion of the law enforcement officer who performed the follow-up investigation, Detective Converse had not interviewed the victim, Ch.M., which the juvenile court had considered to be the most credible witness. Further, the juvenile court explained that the assertions disputing C.C.'s evidentiary hearing testimony, and assertions of additional witnesses that could confirm C.M.'s innocence, had already been addressed in C.M.'s Motion to Correct Error, and thus were available at that time. Accordingly, the juvenile court denied C.M.'s Motion for Relief from Judgment.

C.M. now appeals. Additional facts will be provided as necessary.

DISCUSSION AND DECISION

I. *Sufficiency of the Evidence*

C.M. argues that the evidence presented by the State was not sufficient to prove beyond a reasonable doubt that she has committed battery, an act which would be a Class A misdemeanor if committed by an adult. Specifically, she contends that the evidence was insufficient to prove that she was the person who battered Ch.M.

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and for purposes of this appeal we assume that she was.

Our standard of review of a juvenile adjudication is the same as if the crime had been committed by an adult. *D.D. v. State*, 668 N.E.2d 1250, 1252 (Ind. Ct. App. 1996). In reviewing a sufficiency of the evidence claim, this court does not reweigh the evidence or judge the credibility of the witnesses. *Perez v. State*, 872 N.E.2d 208, 213 (Ind. Ct. App. 2007), *trans. denied*. "It is well-established that 'the uncorroborated testimony of one witness may be sufficient itself to sustain a conviction on appeal.'" *Scott v. State*, 871 N.E.2d 341, 343 (Ind. Ct. App. 2007), *trans. denied*. With regards to identification testimony, even an equivocal identification may be sufficient to support a conviction. *Id*.

At the evidentiary hearing, Ch.M. testified that she was sure that C.M. was the girl that grabbed her and threw her on the ground, explained that she knew both C.M. and C.C., and was confident that she could tell the difference between the two even in the poor lighting at the time of the attack. The trial court emphasized in its written findings that it found the unequivocal identification by Ch.M. particularly credible. In addition, J.B. testified that the individual who battered Ch.M. had the same hair type and build as C.M., and that Ch.M. yelled C.M.'s first name as the attack was committed. Since we cannot judge the credibility of the witnesses, nor reweigh the evidence, we must find the testimony of Ch.M., especially since it has been corroborated by J.B.'s testimony, sufficient to prove beyond a reasonable doubt that C.M. was the perpetrator. *See Perez,* 872 N.E.2d at 213.

II. *Motion for Relief from Judgment*

C.M. also argues that the trial court abused its discretion when it denied her Motion for Relief from Judgment under Ind. Trial Rule 60(B). Specifically, C.M. argues that B.H.'s

would be testimony is newly discovered evidence which requires the juvenile court to grant a new evidentiary hearing.

A method for seeking relief from a delinquency adjudication is moving the juvenile court for relief from judgment. *J.H. v. State*, 809 N.E.2d 456, 458 (Ind. Ct. App. 2004). Since juvenile adjudications do not constitute criminal convictions, post-conviction remedies cannot be interpreted to apply to a juvenile adjudged to be a delinquent. *M.Y. v. State*, 681 N.E.2d 1178, 1179 (Ind. Ct. App. 1997). Thus, our supreme court has determined that other avenues, such as motions pursuant to T.R. 60, are available to juveniles to redress alleged errors in a delinquency proceeding. *Id*.

A motion for relief from judgment under T.R. 60(B) is left to the equitable discretion of the trial court; the grant or denial of the motion will be disturbed only when that discretion has been abused. *Estate of Lee ex rel. McGarrah v. Lee & Urbahns Co.*, 876 N.E.2d 361, 371 (Ind. Ct App. 2007). "In making the decision, the trial court is required to 'balance the alleged injustice suffered by the party moving for relief against the interests of the winning party and society in general in the finality of litigation.'" *Id*. (quoting *Rogers v. R.J. Reynolds Tobacco Co.*, 731 N.E.2d 36, 51 (Ind. Ct. App. 2000)).

T. R. 60(B) permits in relevant part that:

> On motion and upon such terms as are just the court may relieve a party or his legal representative from an entry of default, final order, or final judgment, including a judgment by default, for the following reasons:
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> * * *

> (2) any ground for a motion to correct error, including without limitation newly discovered evidence, *which by due diligence could not have been discovered in time to move for a motion to correct errors under Rule 59.*

(Emphasis added). The alleged newly discovered evidence that C.M. requests us to focus our analysis on is the potentially exculpating testimony of B.H. However, when reviewing the record, we note that C.M. based her previous Motion to Correct Error pursuant to T.R. 59 in part on a claim that B.H. witnessed C.C. pull Ch.M. out of the vehicle. Thus, as the juvenile court explained in its Order denying any relief from judgment, this evidence was discoverable, and actually available, in time to move for a motion to correct errors under T.R. 59. As such, B.H.'s testimony is not permissible grounds for a T.R. 60(B) motion for relief from judgment, and the juvenile court could not have abused its discretion for denying such a motion based on B.H.'s testimony.

Furthermore, even if we addressed the merits of C.M.'s contention—that the juvenile court should grant a new hearing to consider the testimony from another eyewitness that corroborates C.M.'s previously articulated defense—we could not say the juvenile court abused its discretion by denying the Motion for Relief from Judgment. As the juvenile court explained in its Order, B.H.'s testimony would be cumulative evidence of a defense already presented, yet found to be unpersuasive. Moreover, this cumulative evidence would come from the individual who drove C.M. to and from the scene where the attack occurred. The juvenile court explained its position on the potential evidence by stating, "adding another friend's testimony to support [C.M.]'s position does nothing to trump the credible testimony of the victim." (Appellant's Br. p. 38). Such a determination would be within the discretion

of the juvenile court, if the potential evidence was properly before the juvenile court. *Estate of Lee*, 876 N.E.2d at 371.

III. *Effective Assistance of Counsel*

Finally, C.M. argues that she did not receive effective assistance of counsel during the juvenile court proceedings. In particular, she contends that her counsel's failure to call B.H. as a witness during the evidentiary hearing, or continue the hearing in her absence, was an error that rose to the level of ineffective assistance of counsel.

To succeed upon a claim of ineffective assistance of counsel, it must be shown that a deficient performance has prejudiced the defendant. *D.D.K. v. State*, 750 N.E.2d 885, 889 (Ind. Ct. App. 2001).

> A defendant must overcome with strong and compelling evidence the presumption that his counsel was competent. [] A fair trial is denied when a conviction is the result of a breakdown in the adversarial process that renders the result unreliable, and a defendant must show that but for counsel's errors, there was a reasonable probability that the result would have been different. [] Isolated poor strategy, inexperience or bad tactics do not necessarily amount to ineffective assistance of counsel.

D.D.K., 750 N.E.2d at 889 (internal citations omitted); *see also Strickland v. Washington*, 466 U.S. 668 (1984).

Prior to the juvenile court's hearing on C.M.'s Motion for Relief from Judgment, nothing in the record indicated why C.M.'s defense counsel did not call B.H. as a witness or attempt to continue the evidentiary hearing until B.H. would be available to give testimony. As we explained in *D.D.K.*, this type of claimed error is what "our supreme court has characterized as a 'hybrid contention,' consisting of 'an act or omission on the record that is

perhaps within the range of acceptable tactical choices counsel might have made, but in the particular instance is claimed to be made due . . . to some other egregious failure rising to the level of deficient attorney performance.'" *Id.* at 890 (citing *Woods v. State*, 701 N.E.2d 1208, 1212 (Ind. 1998), *cert. denied* 528 U.S. 861 (1999)). When these "hybrid contentions" arise, the presumption that counsel performed competently prohibits us from finding counsel's performance deficient without additional evidence; however, this court cannot engage in fact-finding or take new evidence. *See D.D.K*, 750 N.E.2d at 890. Typically, in circumstances such as these, the proper procedure, which has become known as the *Davis/Hatton* procedure, is to request that the appeal be suspended or terminated so that a more thorough record may be developed through post-conviction proceedings. *Id*. at 890-91 (citing *Lee v. State*, 694 N.E.2d 719, 721 n. 6 (Ind. 1998)). Yet, as we discussed earlier, in juvenile proceedings, post-conviction proceedings are not available. *See M.Y.*, 681 N.E.2d at 1179. Consequently, for a juvenile defendant, an appropriate method for developing the record is by seeking a suspension or termination of the appeal while pursuing a hearing on a motion for relief from judgment before the juvenile court. *See J.H.*, 809 N.E.2d at 458. Thus, C.M. initiated a proper procedure to develop a record from which C.M.'s counsel's competency in not calling B.H. as a witness can be ascertained.

However, what is troubling here, is that C.M.'s trial counsel represented C.M. in the hearing on her Motion for Relief from Judgment, and, thus, did not call himself as a witness

to testify as to why he failed to call B.H.[2] It is apparent from the record, that C.M.'s counsel either did not anticipate pursuing an ineffective assistance of counsel claim on appeal, or simply did not properly use the hearing on C.M.'s Motion for Relief from Judgment as an opportunity to develop the record to support such a claim. Since no evidence was developed with respect to C.M.'s claim of ineffective assistance of counsel, we must acknowledge the presumption that her trial counsel's performance was competent, and cannot find that her trial counsel was ineffective.

Nevertheless, even if C.M. had presented evidence of a deficient performance by her trial counsel, it is unlikely that she would have proven prejudice. The juvenile court found that B.H. is a friend of the defendant, and her proposed testimony, which still to this day has yet to be given under oath, mirrors a defense that the juvenile court has already considered and rejected. As we explained above, the juvenile court has indicated its position as to how it would respond to B.H.'s testimony if it were considered together with the other evidence already presented at the evidentiary hearing adjudicating C.M., by stating: "Moreover, this is not a baseball game with points scored on the basis of how many people one side brings in to testify. Adding another friend's testimony to support [C.M.]'s position does not trump the

[2] C.M. does not direct our attention to any portion of the record which might show the reason that her trial counsel did not call B.H. during the evidentiary hearing. The State directs our attention to where C.M.'s counsel explains during argument that he did not subpoena B.H. because he "did not have her information at that time . . . . We did our due diligence in trying to get her here. We were unable to." (July 27, 2007, Tr. p. 45). However, these were unsworn statements, and as such are not evidence. *See Gajdos v. State*, 462 N.E.2d 1017, 1021 (Ind. 1984).

credible testimony of the victim." (Appellant's Br. p. 38). Therefore, not only has C.M. failed to prove that her trial counsel was deficient, but neither has she shown any reasonable probability that the result would have been different had B.H. been called to testify. See *D.D.K.*, 750 N.E.2d at 889.

CONCLUSION

Based on the foregoing, we conclude that (1) the State proved beyond a reasonable doubt that C.M. battered Ch.M.; (2) the juvenile court did not abuse its discretion by denying C.M.'s Motion for Relief from Judgment; and (3) because C.M. has failed to provide evidence of her trial counsel's deficient performance, she has not demonstrated that she was denied effective assistance of counsel.

Affirmed.

KIRSCH, J., and MAY, J., concur.